United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

ORIGINAL

75-7283

United States Court of Appeals

For the Second Circuit.

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P/S

SAMUEL H. SLOAN, SAMUEL H. SLOAN & CO.,

Plaintiffs-Appellants,

-against-

SECURITIES & EXCHANGE COMMISSION, UNITED STATES OF AMERICA as the SECURITIES & EXCHANGE COMMISSION, NATIONAL QUOTATION BUREAU, INC., BUNKER RAMO CORP., NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC., DISCLOSURE, INC., NATIONAL CLEARING CORP.,

Defendants-Appellees.

On Appeal From The United States District Court For The Southern District of New York

APPELLANTS' REPLY BRIEF

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CONSTITUTION, STATUTES AND RULES:

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PRELIMINARY STATEMENT

Oral argument of this appeal was held on February 19, 1976. The appellant received the brief for the NASD less than a week prior to oral argument, and in view of this fact requested permission to file a post argument brief. This request was granted and the appellant was given permission to file a brief reply brief. This is that brief brief.

ARGUMENT

At oral argument, the appellant devoted his principal attention towards making a distinction between a lawsuit based upon allegations that officers of the government have merely abused their discretionary powers as opposed to a lawsuit based upon allegations that officers of the government have acted illegally and/or violated the constitutional rights of the plaintiff. It turns out, however, that the judges who heard the oral argument of this appeal are aware of precisely the distinction the appellant was trying

to make because two of them were on the panel which decided Myers & Myers v United States Postal Service Docket No. 74-2629 (2d. Cir. December 24, 1975). At slip opinion p. 1264, this comprehensive decision stated in part:

> "C. Exceptions for "Discretionary Functions" and for Acts in Execution of a Statute. The Government renews its argument that the "Discretionary function" exception applies. But here the appellants' argument is that the Postal Service has acted in contravention of its own regulations, if not unconstitutionally, in denying appellants a hearing prior to debarment from government contracting. It is, of course, a tautology that a federal official cannot have discretion to behave unconstitutionally or outside the scope of his delegated authority. See Marbury v Madison, 5 U.S. (1 Cranch) 137, 170-71 (1803); Larson v Domestic & Foreign Commerce Corp., 337 U.S. 682, 689-90(1949); Century Arms, Inc. v Kennedy, 323 F. Supp. 1002, 1005 (D. Vt.), aff'd, 449 F. 2d 1306 (2d Cir. 1971), cert. denied, 405 U.S. 1065 (1972). This distinguishes cases such as Scanwell Laboratories, Inc. v Thomas, supra, and United States v Morrell, supra, which hold that even though discretion is abused, its exercise cannot give rise to a federal tort claim. See 28 U.S.C. §2680(a). For here the appellants' claim is that the Postal Service lacked discretion to act in disregard of its own applicable regulations and of the Constitution. See Larson v Domestic & Foreign Commerce Corp., supra; Hatahley v United States, 351 U.S. 173, 181 (1956)."

It should be added that the assistant U.S. Attorney who argued this appeal was good enough to bring this decision to the attention of this court. It is clear that this decision is directly on point because the principal thrust of the complaint here is that the Securities & Exchange Commission, ("S.E.C."), through its officers, has violated the Securities Exchange Act of 1934 as well as federal anti-trust law and, in addition, has deprived the plaintiff of his constitutional rights. Thus the principal question on this appeal is whether a complaint which makes such allegations can be sustained.

The S.E.C. argues that any complaint, including this one, which names the S.E.C. as a defendant must be dismissed as to the S.E.C. regardless of what is alleged in the complaint and regardless of whether injunctive, declaratory or damage relief is sought. This claim seems shaky, if not outright frivolous, at first impression, but the S.E.C. argues that this point has been "expressly held." However, the cases in which the S.E.C. claims that this has been "expressly held" are less than convincing and a discussion of them is appropriate here.

The decision most favorable to the S.E.C. on this point is Holmes v Eddy 341 F. 2d. 477 (4 Cir. 1965) where the court did in fact state that the S.E.C. may not be sued eo nomine. However, the last paragraph of this decision makes it clear that this statement was dictum. There the court said:

> "Analysis and review of the record of the District Court demonstrates that the appeal in each of these cases is without merit and accordingly the judgment by the District Court is affirmed." 341 F. 2d at 482.

Thus it is clear that the case was decided on the merits after an examination of the evidence and not because of any application of the principle of sovereign immunity. There were no triable issues of fact in dispute in that case and no constitutional questions were involved. The Fourth Circuit also based its dismissal on the finding that certain of the defendants were "public officers --- acting within the scope of their official duties." It is clear that had the case been one where to the contrary the public officers exceeded their authority and violated the very law which gave them the power to act, a different result would have been achieved. Thus, the statement that the S.E.C. may not be sued eo nomine was dictum and in any event is not binding on this Circuit.

The next decision cited by the S.E.C. is M.G. Davis & Co. v S.E.C. 252 F. Supp. 402 (S.D.N.Y. 1966). That decision also states that the S.E.C. may not be sued. It is submitted, however, that that district court decision is erroneous. Moreover, it is not binding on this court and is readily distinguishable in at least three respects. The decision states:

> "Plaintiffs cite Amos Treat & Co. v S.E.C. 306 F. 2d 260 (D.C. Cir. 1962) in which the court enjoined the Commission from conducting certain public proceedings, but that case is clearly distinguishable. There, the verified complaint, which named the individual Commissioners in addition to the Commission, made a substantial showing that due process had been violated. Here, the complaint names only the Commission; it is not verified; and there is no showing of a violation of due process. Cf. S.E.C. v R. A. Holman & Co. 323 F. 2d 284, cert. denied 375 U.S. 943 (1963).
>
> It is unnecessary to treat the other points raised by the parties.
>
> .....
>
> Defendant's motion to dismiss the complaint is granted without prejudice and without costs to either party."

The three distinguishing features are clear: (1) In the case at the bar the complaint is verified, (2) in the case at the bar the complaint does allege that due process has been violated and (3) in the case at the bar Judge Griesa dismissed the complaint with prejudice and without leave to replead whereas the judge in M.G. Davis & Co., supra dismissed the complaint without prejudice and presumably with leave to file a new complaint joining the individual Commissioners as defendants. It should also be added with regard to point two above that the complaint in the case at the bar alleges, inter alia that due process rights of the plaintiff have been violated in connection with the suspension of trading in twenty-eight securities listed in the complaint and this court, in reviewing the orders of suspension of trading of just one of these securities, has stated that this constitutional claim is non-frivolous and does not seem to have been judicially decided. Samuel H. Sloan v S.E.C. (2d. Cir. Oct. 15, 1975) slip op. 213.

The third "express holding" cited by the S.E.C. is Koss v S.E.C. 364 F. Supp. 1321, 1327 n. 14 (S.D.N.Y. 1973). That decision, however, does not help the S.E.C. and to the contrary states that the claim that the S.E.C. cannot be sued is frivolous. That decision is correct. The claim advanced by the S.E.C. that it can never be sued is frivolous as are many of the other claims advanced by the S.E.C. Indeed, the Supreme Court, in the last paragraph of Foremost-McKisson, Inc. v Provident Securities Co. ___U.S. ___ (decided Jan. 13, 1976) recently stated:

> "[E]ven if the Commissions views have not changed we would not afford them the deference to which the views of the agency administering the statute are usually entitled."

This slap in the face was clearly justified. Here, for example, Congress has recently amended §3(a)(9) of the Exchange Act in such a way as to make it obvious that the S.E.C. can be sued. This point was explained in detail on page 13 of the appellant's brief and will not be repeated here.

The argument of the S.E.C. bases its starting point on Blackmar v Guerre 342 U.S. 512 (1952). However, that decision does not lead to the

result that the S.E.C. claims here which is that the S.E.C. enjoys a sovereign immunity from suit. All the Supreme Court decided in Blackmar v Guerre was that the venue of the suit was improper. The Supreme Court stated that the action could not be maintained in the District Court for the Eastern District of Louisiana because the "courts of the District of Columbia are the only courts of 'competent jurisdiction' to reach the members of the Civil Service Commission." 342 U.S. at 516. Since that time Congress has passed legislation and as a result the day has passed when there was a requirement that certain types of suits against the federal government must be brought in the District of Columbia. Consequently, the holding of Blackmar v Guerre is no longer relevant.

In any event, the complaint in this action states that the Commissioners "are being sued individually and in their official capacity." (A27). When the words "Securities & Exchange Commission" are uttered these words have an ambiguous meaning. They can be taken to mean either the government agency or the five individuals who make up the Commission depending on the context in which the words are used. Therefore, what the S.E.C. perceives to be a fatal flaw in this suit is at best a mere irregularity. In effect, Sloan has sued the individual Commissioners by describing them by their official title. This procedure is authorized by Fed. R. Civ. P. 25(d)(2) and if this court finds this to be a technical irregularity, the irregularity may be corrected in accordance with the same rule in that "the court may require" that the individual commissioners be added. It is clear from Foman v Davis 371 U.S. 178 (1962) that purely technical matters should not affect the outcome of a suit.*

It is unfortunate that so much attention must be devoted to an argument advanced by the S.E.C. which is essentially frivolous because this leaves

*Actually, in Myers & Myers, supra the court reached precisely the opposite result from that which the S.E.C. is urging here and concluded that the individual defendants should not have been joined. Thus, not only has Sloan not committed a technical irregularity but he has pleaded his case properly.

little time for the briefing of questions of more substance. In any event, it is now necessary to be inordinately brisk and even to ignore certain other arguments advanced by the appellees. The United States argues this suit may not be maintained under the Federal Tort Claims Act. (Brief for the United States of America p. 5). Here it should be pointed out that the S.E.C. is incorrect in its statement that Sloan "made no attempt to assert a claim under that act below." (Brief for S.E.C. p. 10). Sloan did in fact raise that Act in the District Court and the United States of America responded informally in its letter of February, 1976 to Judge Griesa. On appeal, the United States of America argues for the first time that Sloan has failed to exhaust his administrative remedies. However, it also argues that the wrongs alleged by Sloan would not be actionable under the Federal Tort Claims Act in any event. It is submitted that the United States of America has thereby conceded that it would be futile for Sloan to file an administrative claim. It is well established that a litigant is not required to exhaust his administrative remedies prior to coming to court if he can establish that an attempt to persue his claims in the administrative forum would be an act of futility. In short, on this point the United States of America has succeeded in defeating itself by its own argument.

The United States of America also cites Scanwell Laboratories, Inc. v Thomas 521 F. 2d 941 (D.C. Cir. 1975). It is interesting to note that the appellants brief cites a prior decision of the same case under the name of Scanwell Laboratories, Inc. v Shaffer 424 F. 2d. 859 (D.C. Cir. 1970). The collective wisdom of these two decisions is that where a government official, acting within the scope of his official authority, abuses his discretion, an aggrieved party may be entitled to an injunction but may not be entitled to an award of tort damages. This point is interesting but nevertheless is irrevelant to the determination of this appeal because in O'Connor v Donaldson ___U.S. ___, 45 L. Ed. 2d 396 (1975) and in other cases cited in pages 20, 21 and 51 of the appellant's brief it is clear in cases where the defen-

dant has knowingly deprived the plaintiff of a constitutional right, an award of money damages will be sustained regardless of whether or not the defendant was acting within his statutory authority. This point, which is thoroughly argued in the appellant's brief, is greeted with silence from all of the appellees.

Every appellee brief, with the exception of the brief for the United States of America, argues that in one way or another the antitrust aspect of this lawsuit may not be maintained because of the nature of the governmental action involved. It is submitted that all of these arguments are wrong and the cases cited in these briefs do not lead to the conclusion the various appellees reach. For example, two briefs cite United States v Cooper 312 U.S. 600 (1940). That decision by the late great Judge Owen Josephus Roberts established that the United States of America may not maintain a treble damage suit under the Sherman Act. From this and from a number of decisions involving purely state action, the S.E.C. leaps to the conclusion that all federal agencies are shielded from antitrust liability because a holding to the contrary would be "a peculiar result." (Brief for S.E.C. p. 13 n. 12). Of course, all of the state cases cited by the S.E.C. are irrevelant since the Eleventh Amendment provides the states with immunity from suits in the federal courts. Moreover, the "peculiar result" argument is not convincing because there are many anomalies in the law and it is well established that the duty of the courts is not to fill gaps in the law but rather to interpret the existing law regardless of how illogical or peculiar it may sometimes be.

United States v Cooper, supra is cited by the appellees to establish that the United States is not a "person" within the meaning of the Sherman Act. However, §3(a)(9) of the Securities Exchange Act of 1934 (15 U.S.C. §78c (a)(9)) defines every "government, ... agency, or instrumentality of a goverrment" as a "person." Clearly, the S.E.C. is a "person" within this definition. The question is whether this definition of person can be carried over to the Sherman Act. It is submitted that the answer is yes because the

Sherman Act, 15 U.S.C. §7, does not exclude the S.E.C. from its definition of person and, unlike the United States of America, it cannot be said that "the ordinary dignities of speech would have led" to the inclusion of the S.E.C. by name. Any claim that the S.E.C. is immune from suit under the antitrust laws is without merit. In fact, the United States Department of Justice has, on at least two occasions, sued the Interstate Commerce Commission on the grounds that ICC regulatory action violated the antitrust laws. See United States v Interstate Commerce Commission 337 U.S. 426 (1949); United States v ICC 352 U.S. 158 (1956).

Similarly, most of the other cases cited by the appellees are readily distinguishable or else, for various reasons, do not lead to the conclusion which the appellees claim they require. Here it may be said that the appellant actually despaired of prevailing in this appeal as to certain of the appellees until he looked up the cases upon which the appellees were relying. A few examples are appropriate.

The National Quotation Bureau, Inc. ("NQB") argues that under Sun Valley Disposal Co. v Silver State Disposal Co. 420 F. 2d 341 (9th Cir. 1969) Sloan cannot, by charging a conspiracy between the NQB and public officials at the S.E.C., convert a claim against the S.E.C. into a federal antitrust case. (Brief p. 14). However, the decision in question merely held that the municipal garbage collection activities of the defendants were purely local in nature, did not affect interstate commerce, and therefore were not within the scope of the federal antitrust laws. Both the NQB and Disclosure, Inc. cite E.W. Wiggins Airways Inc. v Massachusetts Port Authority 362 F. 2d 52 (1st Cir.) cert. denied 385 U.S. 947 (1966). However, that decision merely held that "there was no attempt on the part of Congress to impose liability" under the Sherman Act on any of the states of the United States. Disclosure and the NQB would have this court read the word "state" in that decision as meaning "governmental." However, it is clear that the state in that decision was the State of Massachusetts. It does not follow that the federal government and every agency and subdivision thereof are "states" within the meaning

of that decision. The same point applies to Parker v Brown 317 U.S. 341 (1942), cited by the S.E.C., the NQB and Disclosure, and to Saenz v University Interscholastic League 487 F. 2d 1026 (5th Cir. 1973) cited by the S.E.C. and the NQB. These cases involve "state action" which means action by one of the fifty states of the United States. In the case at the bar no defendant has argued that there is state action involved here and hence these decisions are irrevelant.

The appellees also cite a number of cases which involve the federal government. However, in each of these cases the defendant was entitled to summary judgment if and only if he could show that the government official acted within the "outer perimeter" of the authority vested in him by statute. A case, not relied upon by any of the appellees, which neatly explains this point is S & S Logging Corp. v Barker 366 F. 2d 617 (9th Cir. 1966). Another decision Alabama Power Co. v Alabama Electric Cooperative Inc. 394 F. 2d 672 (5th Cir. 1968) cert. denied 393 U.S. 1000, relied upon by the NQB, is along these same lines. Among the defendants named in those cases were employees of the federal government. In each case the acts which formed the basis for the lawsuit were alleged to have been done with a wrongful purpose but neverless were clearly within the authority vested by statute. In no case was a constitutional question involved. In short, the basic holding by the court was the same as in Scanwell Laboratories v Thomas, supra.

Thus, the various arguments presented by the appellees complete a full circle without ever arriving at a point which requires that the complaint in this action be dismissed. The decisions which the appellees find to be most favorable are all based upon Barr v Matteo 360 U.S. 564 (1958). However, that decision dealt merely with "[t]he law of privilege as a defense by officers of government to civil damage suits for defamation and kindred torts." 360 U.S. at 569. Since the courts have yet to establish that there exists a constitutional right not to be defamed by an officer of the government or even that it is illegal for a government official to make defamatory remarks,

such as the S.E.C. the unfettered right to grant a monopoly for the sale of a particular product, in this case copies of all documents filed with the S.E.C., to the general public. Moreover, the product in question is obviously not one "for which it is impracticable to secure competition," see 41 U.S.C. §252(c)(10), since innumerable companies are in the photocopy business and many no doubt are willing and able to compete with Disclosure.

There are a number of arguments advanced by the appellees which do not necessitate a reply because they were anticipated and responded to fully in the appellants' main brief. However, one final point must be made. The five briefs filed by the appellees contain a total of exactly one hundred pages and cite ninety-two separate cases. A variety of statements are made concerning the underlying basis for the District Court's decision. However, these statements are purely speculative. Only one of the ninety-two cases relied upon by the defendants was cited by Judge Griesa and that is Ricci v Chicago Merchantile Exchange 409 U.S. 289 (1973) which is relied upon only by the NASD. From this it should be obvious that the district court judge failed to do his job properly and now this appellate court is being called upon to do it for him. However, it has been established that it is not the function of an appellate court to assume the powers of a trial court. Schilling v Schwitzer-Cummins Co. 142 F. 2d 82 (D.C. Cir. 1944); cf. Kelley v Everglades Drainage Dist. 319 U.S. 415 (1943), rehearing denied 320 U.S. 214, motion denied 321 U.S. 754; Woods Constr. Co. v Pool Constr. Co. 314 F. 2d 405 (10th Cir. 1963).

CONCLUSION

For all of the reasons set forth above, the judgment of the district court should be vacated and the cause should be remanded.

DATED: February 22, 1976

Respectfully submitted,

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it is clear that Barr v Matteo, supra does not have any application to the instant case where the threshold question, which has yet to be passed upon, is whether the actions of the defendants were legal. Similarly, Eastern R.R. Conference v Noerr Motor Freight 365 U.S. 127 (1961) does not require that this action be dismissed. That decision observed that "where a restraint upon trade or monopolization is the result of valid governmental action "no violation of the Sherman Act can be made out. 365 U.S. at 136. The key word here is "valid." For example, the NQB gives a vague indication that certain things it did which allegedly caused injury to Sloan were the result of governmental action such as the suspension of trading of various securities and the promulgation of rules such as Rule 15c2-11 (Brief for NQB p. 7). It does not defend these governmental actions as being valid however. To cite another example, Disclosure states that it has a contract with the S.E.C. based upon 41 U.S.C. §252. However, Disclosure does not argue that this contract is valid. Although it is fair to assume that Disclosure is prepared to defend the validity of its contract with the S.E.C., the fact is that the question of the validity of this contract goes directly to the heart of this lawsuit as to Disclosure. The appellant is prepared to concede that if this contract is legal, valid and binding and Disclosure has done nothing more than perform under this contract, then Disclosure may not be held liable under the Sherman Act. However, in so doing, the appellant has conceded nothing because all he has really stated is a tautology to the effect that if the contract is legal then the contract is legal. It is clear that in order to determine the legality of the contract the district court must at least look at the contract and thus far this is something the district court has not done. Therefore, it is obvious that the judgment must be vacated and the cause remanded as to Disclosure. It should also be added that it seems relatively clear from what Disclosure has said that its contract with the S.E.C. is illegal. 41 U.S.C. §252 concerns purchases of property by the Government. However, the S.E.C. does not purchase anything from Disclosure and no money changes hands between them. Clearly, this section does not give a government agency

SLOAN reply brief 75-7283

STATE OF NEW YORK)
: SS.
COUNTY OF NEW YORK)

ROBERT BAILEY, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N.Y. 10302. That on the 26 day of Feb. 197 6 deponent served the within Reply Brief upon:

Securities and Exchange Commission;
Willkie, Farr & Gallagher, Esqs.;
Rogers & Wells, Esqs. and
Robert Waldow, National Clearing Corp.

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Appellees

in this action, at
500 N. Capital, Washington, D.C. 20549
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200 Park Ave., NYC 10017 and
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respectively

the address(es) designated by said attorney(s) for that purpose by depositing 3 true copies of same enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States post office department within the State of New York.

Robert Bail

Robert Bailey

Sworn to before me, this 26
day of Feb., 1976.

WILLIAM BAILEY
Notary Public, State of New York
No. 43-0132945
Qualified in Richmond County
Commission Expires March 30, 1976